137-673
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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1249.

THE UNITED STATES, APPELLANT,

vs.

SALLY E. PAGE, EXECUTRIX OF FRANK A. PAGE, DECEASED.

APPEAL FROM THE COURT OF CLAIMS.

FILED AUGUST 27, 1890.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

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SALLY E. PAGE, EXECUTRIX OF FRANK A. PAGE, DECEASED.

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15731

1 In the Court of Claims.

Filed August 31, 1887.—A. H.

FRANK A. PAGE, CLAIMANT,
vs.
THE UNITED STATES, DEFENDANT. } No. 15745.

To the Honorable Chief Justice and Judges of the Court of Claims:

The petition of Frank A. Page respectfully represents:

I.

That he is a citizen of the United States and a resident of the District of Columbia.

II.

That on the 18th day of January, A. D. 1865, he was duly appointed and commissioned as a second lieutenant in the Veteran Reserve Corps of the volunteer Army of the United States, and served as such officer until the 20th day of September, A. D. 1866, when he was honorably mustered out of such military service of the United States.

III.

That on the 3d day of October, A. D. 1866, he was duly appointed and commissioned as a second lieutenant in the Forty-fourth Regiment of Infantry of the Army of the United States, to rank as such from the 28th day of July, A. D. 1866, and that he accepted such appointment on the 3d day of October, 1866.

2 IV.

That he served in said capacity until the 3d day of August, 1870, when he was transferred to the Tenth Infantry.

V.

That he continued to serve in said last-named regiment until the 22d day of September, 1871, when, by order of the President, he was, upon the recommendation of the retiring board of the U. S. Army, retired from active service, and was placed upon the retired list of the Army as such second lieutenant.

VI.

That from said last-mentioned date to the date of the filing of this petition he has ever since remained a second lieutenant upon the said retired list, subject to all the regulations and orders governing officers upon the retired list; yet, notwithstanding, ever since the 27th day of May, 1874, he has been refused all pay and emoluments to which he is lawfully en-

titled, by reason, as alleged, of a certain order issued by the Adjutant-General of the Army, dated War Department, Adjutant-General's Office, May 27, 1874, and purporting to be General Court-Martial Orders, No. 42, wherein and whereby, by paragraph III of said order, it is asserted that your petitioner ceases to be an officer of the Army from the date of said order, by reason whereof the proper officers of the Pay Department of the Army have refused to pay to your petitioner the pay and emoluments to which he is lawfully entitled.

VII.

Your petitioner avers that the said order, so far as the same purports to dismiss him from the Army of the United States, or to deprive him
3 of his said office, is null and void, and that he is entitled to receive his lawful pay, and to have and retain the said office, notwithstanding the said order; that the court-martial proceedings upon which the said order was predicated were never submitted to or approved by the President of the United States, and without such approval no power existed in the Adjutant-General or the Secretary of War to deprive him of his commission or his lawful pay as such second lieutenant.

And your petitioner claims the sum of seventeen thousand eight hundred and thirty five dollars and sixty cents ($17,835.60) as and for his pay as such second lieutenant for the period from the 28th day of May, 1874, to the 30th day of June, 1887.

And as, &c.

FRANK A. PAGE,
Second Lieutenant U. S. A. (retired).

McDONALD, BRIGHT & FAY,
Attorneys for Claimant.

DISTRICT OF COLUMBIA,
City of Washington, ss:

Frank A. Page, the above-named claimant, being duly sworn, says that he has heard read the foregoing petition by him subscribed and knows the contents thereof; that the matter therein set forth of his own knowledge are true, and those stated upon information and belief he believes to be true; that the sum claimed therein is justly due him, after allowing all just credits and offsets; and that no assignment or transfer of the claim, or any interest therein, has been made.

FRANK A. PAGE.

Subscribed and sworn to before me this 30th day of August, A. D. 1887.

[SEAL.] ISAAC C. SLATER,
Notary Public.

4 II. *General traverse, filed Nov.* 12, 1887.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

ROBERT A. HOWARD,
Assistant Attorney-General.

5 III. *Plea of statute of limitations.*

The defendant says that all of claimant's alleged demand which accrued prior to the 31st day of August, 1881, accrued more than six years before the filing of claimant's said action.

Wherefore defendant moves to dismiss so much thereof as accrued prior to the date named.

JNO. B. COTTON,
Assistant Attorney-General.
JNO. C. CHANEY,
Assistant Attorney.

Filed Feb'y 4, 1890.

6 IV. *Suggestion of death of claimant. Filed & allowed Mch.* 21, 1890.

Comes now McDonald, Bright & Fay, attorneys for claimant, and suggest to the court that Frank A. Page, claimant, departed this life on the 12th day of October, 1889, at Tacoma Park, in the District of Columbia.

MCDONALD, BRIGHT & FAY,
Attorneys for Claimant.

7 V. *Petition of executrix to revive cause, and letters testamentary. Filed & allowed March* 21, 1890.

The petition of Sally E. Page respectfully represents that she is the executrix of the will of the late Frank A. Page, deceased, who departed this life on the 12th day of October, 1889, at Tacoma Park, in the District of Columbia.

That he left a last will and testament, which has been duly admitted to probate by the supreme court of the District of Columbia, and letters testamentary issued to your petitioner, an exact copy of which is hereto attached and made part of this petition.

Petitioner therefore prays that the suit of Frank A. Page vs. The United States, No. 15745, may be revived in her favor as executrix of the last will and testament of the deceased.

SALLIE E. PAGE.

MCDONALD, BRIGHT & FAY,
Att'ys for Claimant.

Subscribed and sworn to before me on this 21st day of March.

[SEAL.] SARAH S. SAMPSON,
Notary Public.

8 In the supreme court of the District of Columbia, holding a special for orphans' court business.

DISTRICT OF COLUMBIA, *to wit:*

The United States of America to all persons to whom these presents shall come, greeting:

Know ye, that on the 21st day March, in the year of our Lord 1890, administration of all the goods, chattels, and credits of Frank A. Page, late of the District of Columbia, deceased, was, by the supreme court of the District of Columbia aforesaid, granted and committed unto Sallie E. Page, the said Sallie E. Page, as executrix of said Frank A. Page, deceased, having first executed a bond to the United States with good sureties approved by the said court in the penalty of two hundred and fifty dollars, conditioned for the faithful performance of the trust in her reposed and having also taken the required oath.

Witness: Walter S. Cox, justice, holding the special term of the said supreme court for orphans' court business, this 21st day of March, in the year of our Lord one thousand eight hundred and ninety, and of the independence of the United States the one hundred and fourteenth.

[SEAL.] DORSEY CLAGETT,
Register of Wills for the District of Columbia.

9 VI. *Motion for leave to amend petition. Filed & allowed March* 21, 1890.

Comes now Sally E. Page, executrix, and moves the court for leave to amend petition filed in this case, by averring the death of Frank A. Page on the 12th day of October, 1889, and amending the prior petition so as to claim pay for said deceased as second lieutenant for the period from the 28th day of May, 1874, to the 12th day of October, 1889, being the sum of $20,816.33.

SALLIE E. PAGE.

McDONALD, BRIGHT & FAY,
Att'ys for Claimant.

Subscribed and sworn to before me this 21st day of March, A. D. 1890.

[SEAL.] SARAH S. SAMPSON,
Notary Public.

10 VII.—*Findings of fact and conclusion of law.*

FINDINGS OF FACT.

This case having been heard by the Court of Claims, the court, upon the evidence, finds the facts as follows:

I.

On January 18, 1865, the claimant was mustered in as a second lieutenant in the Veteran Reserve Corps of Volunteers, and served as such till September 20, 1866, when he was honorably mustered out.

October 3, 1866, he was appointed second lieutenant in the Forty-fourth Regiment of Infantry, U. S. Army, and accepted the appointment the same day.

August 3, 1870, he was transferred to the Tenth Regiment of Infantry.

September 29, 1871, by order of the President he was retired from active service, and placed on the retired list of the Army, on account of wounds received in battle, *i. e.*, the loss of his right arm.

II.

April 29, 1874, a court-martial was convened at New York City, by virtue of Special Orders, No. 73, dated April 7, 1874, Headquarters Military Division of the Atlantic, for the trial of Second Lieutenant Frank A. Page (retired). Before this court-martial Lieut. Page was arraigned and tried on the following charges and specifications, viz:

CHARGE I.—"Presenting for payment a false and fraudulent claim against the United States, in violation of the act of March 2d, 1863, chapter 67."

Specification.—"In this: That Second Lieutenant Frank A. Page, United States Army (retired), having, on or about January 30th, 1873, sold and transferred his pay account and right to pay for the month of November, 1873, to the Piedmont and Arlington Life Insurance Company of Richmond, Virginia, did, notwithstanding, personally present to Major P. P. G. Hall, paymaster, U. S. Army, a claim against the United States for his pay for said month of November, 1873, he, the said Page, well knowing that the said claim—inasmuch as he had previously sold and assigned all his right to and property in said pay as aforesaid—was wholly false and fraudulent. This at or near New York City, on or about December 3d, 1873."

CHARGE II.—"Causing to be presented for payment a false and fraudulent claim against the United States, in violation of the act of March 2d, 1863, chapter 67."

Specification.—"In this: That Second Lieutenant Frank A. Page, United States Army (retired), having, on or about January 30th, 1873, sold and transferred his pay account and right to pay for the month of January, 1874, to the Piedmont and Arlington Life Insurance Company of Richmond, Virginia, and having, further, on or about June 1st, 1873, sold and transferred the same account and right to J. H. Squier
11 & Company, of Washington, D. C., did, further, on or about December 8th, 1873, sell and transfer the said account and right to Captain Thomas H. Norton, United States Army (retired), and did thus cause his claim for said pay for said month of January, 1874, to be presented for payment by said Norton to Major R. D. Clarke, paymaster, United States Army, he, the said Page, well knowing that said claim thus presented was wholly false and fraudulent, inasmuch as he had previously sold and transferred all his right and property therein to other parties as aforesaid. This at or near Washington, D. C., on or about February 5th, 1874."

Charge III.—"Conduct unbecoming an officer and a gentleman."

Specification 1st.—"In this: That Second Lieutenant Frank A. Page, United States Army (retired), having on or about January 30th, 1873, sold

and transferred his pay account and right to pay for the month of November, 1873, to the Piedmont and Arlington Life Insurance Company of Richmond, Virginia, thereby enabling said company to receive to its own use from Major R. D. Clarke, paymaster United States Army, on December 3d, 1873, the pay due him for said month, amounting to ninety-six dollars and twenty-five cents, did, notwithstanding, fraudulently and dishonorably present in person to Major P. P. G. Hall, paymaster United States Army, his claim for pay for the said month of November, 1873, and did then and there personally receive the amount thereof, namely, the said sum of ninety-six dollars and twenty-five cents, he, the said Page, well knowing that he had no right or property in said claim or payment; and thus in fact defrauding the United States out of the sum of ninety-six dollas and twenty-five cents, so caused by him to be twice paid as aforesaid. This at New York City, on or about December 3d, 1873."

Specification 2d.—"In this: That Second Lieutenant Frank A. Page, United States Army (retired), having, on or about January 30th, 1873, sold and transferred his pay account and right to pay for the month of January, 1874, to the Piedmont and Arlington Life Insurance Company, of Richmond, Virginia, did thereafter, fraudulently concealing the fact of the former sale and transfer, again sell and transfer the said account and right to pay for the said month of January, 1874, to J H. Squier & Company, of Washington, D. C., thus dishonorably making use of his official position in the Army to deceive and defraud. This at or near Washington, D. C., on or about June 1st, 1873."

Specification 3d.—"In this: That Second Lieutenant Frank A. Page, United States Army (retired), having, on or about January 30th, 1873, sold and transferred his pay account and right to pay for the month of January, 1874, to the Piedmont and Arlington Life Insurance Company, of Richmond, Virginia, and having further, to wit, on or about June 1st, 1873, again sold and assigned the said account and right to pay to J. H. Squier & Company, of Washington, D. C., did, notwithstanding, fraudulently concealing the fact of his former sales and transfers of the same, again sell and assign his said account and right to pay for the said month of January, 1874, to Captain Thomas H. Norton, United States Army (retired), thus dishonorably making use of his official position in the Army to deceive and defraud. This at or near New York City, on or about December 8th, 1873."

To which charges and specifications the accused 2d Lieutenant Frank A. Page, U. S. Army (retired), pleaded "not guilty."

FINDING.

The court, having maturely considered the evidence adduced, finds the accused, 2d Lieutenant Frank A. Page, U. S. Army (retired), as follows:

CHARGE I.

Of the specification, "Guilty, except the words 'he, the said Page, well knowing that the said claim—inasmuch as he had previously sold and assigned all his right to and property in said pay, as aforesaid—was wholly false and fraudulent,' and substituting therefor the words 'which said claim was false and fraudulent.'"

Of the charge, "Not guilty."

CHARGE II.

Of the specification, "Guilty, except the words 'Captain Thomas H. Norton, United States Army (retired),' and substituting therefor the words 'Messrs. Latham, Alexander & Company.'"

Of the charge, "Guilty."

CHARGE III.

Of the 1st specification, "Guilty, except the words 'ninety-six dollars and twenty-five cents,' wherever they occur, and substituting therefor 'sixty-five dollars and forty-two cents,' and except the words 'fraud-
12 ulently and dishonorably,' and the words 'he, the said Page, well knowing that he had no right or property in said claim or payment,' and of the excepted words, not guilty."

Of the 2d specification, "Guilty."

Of the 3d specification, "Guilty, except the words 'Captain Thomas H. Norton, United States Army (retired),' and substituting therefor 'Messrs. Latham, Alexander & Company.'"

Of the charge, "Guilty."

SENTENCE.

And the court does, therefore, sentence him, 2d Lieutenant Frank A. Page, U. S. Army (retired), "To be dismissed the service of the United States."

III.

The proceedings, findings, and sentence were transmitted to the Secretary of War, who wrote upon the record the following order, viz:

WAR DEPARTMENT,
Washington City, May 27th, 1874.

In conformity with the 65th of the rules and articles of war, the proceedings of the general court-martial to the foregoing case have been forwarded to the Secretary of War, and by him submitted to the President.

The proceedings and the findings upon the second charge and specification, and upon the third charge under its second and third specifications, are approved.

With regard to the other findings, the remarks noted by Major-General Hancock, who convened the court, are concurred in, as follows:

"The finding to the first specification is not approved. The sale of Lieutenant Page's pay accounts and right of pay to the Piedmont and Arlington Life Insurance Company is not sustained by the evidence. The transaction was unquestionably a pledge as collateral security. But the court having found that it was a sale, it is difficult to account for the rest of the finding to this specification, which describes the subsequent presen-

tation of a claim against the United States for the same pay as false and fraudulent, although it acquits Lieutenant Page of knowing that it was such.

"In order to constitute fraud there must be a knowledge that the property belongs to another and a design to deprive him of it. If these are wanting it is not fraud. So the word 'false' used in this connection implies an intent to cheat or defraud. Moreover, if the transaction with the Piedmont and Arlington Life Insurance Company was a sale, as the court found it to be, how could the accused, knowing that he had made such a sale, present a claim for the same pay without knowing that it was false and fraudulent? By its finding to the specification the court convicts the accused of presenting a claim against the United States for his pay which was false and fraudulent, and yet acquits him of the charge of 'presenting for payment a false and fraudulent claim against the United States. The finding to the first charge is therefore likewise disapproved.

"Again, having by its finding to the specification of the 1st charge characterized the presenting of a claim for pay as false and fraudulent, the court, by its finding to the 1st specification of the 3d charge, say that he did not do it 'fraudulently and dishonorably,' nor 'knowing that he had no right or property in said claim or payment,' and this, notwithstanding that he is by the same finding found guilty of 'defrauding the United States.'

"The finding to this specification, however, convicts the accused of the facts upon which it is based."

The sentence is approved.

Second Lieut. Frank A. Page (retired) accordingly ceases to be an officer of the Army from the date of this order.

WM. W. BELKNAP,
Secretary of War.

The said Secretary also issued, May 27, 1874, General Court-Martial Order No. 42, announcing the sentence of the court-martial, and that "Second Lieut. Frank A. Page (retired) ceases to be an officer of
13 the Army from the date of this order." From the date of this order the claimant's name has not been borne on the Army Register, and he has received no pay as an officer of the Army since that time.

CONCLUSION OF LAW.

Upon the foregoing facts, the court determines that the claimant is entitled to recover the sum of $11,572.75.

That amount being the sum due the decedent within the statute of limitation of six years before the commencement of the suit.

VIII. Opinion.

WELDON, J., delivered the opinion of the court:

In this proceeding, the claimant seeks to recover the pay of Frank A. Page, deceased, as an officer on the retired list of the Army, whose name was stricken from the roll on the 27th of May, 1874, in the execution of the sentence of a court-martial, which, before that time, had found him guilty of the presentation of false and fraudulent claims against the Government.

As the result of the execution of said sentence, the decedent has not received pay since said date, and this suit was brought to recover the retired pay of an officer of his grade from said time until the commencement of this case. It is insisted by the claimant that the judgment of the court-martial is defective, because it does not affirmatively appear, from the allegations of the record, that the findings of the court were submitted to and approved by the President.

The same question was before this court in the case of Runkle v. The United States (19 C. Cls., 396), and on appeal, the Supreme Court held, that a record from which it could not be ascertained affirmatively, that the President had approved the findings of a court-martial, was not sufficient to justify the execution of the sentence (Runkle v. The United States, 122 U. S. R., 543).

14 It does appear in this case that "In conformity with the sixty-fifth of the Rules and Articles of War, the proceedings of the general court-martial in the foregoing case have been forwarded to the Secretary of War, and by him submitted to the President." In that particular it is somewhat different from the allegations of the record in the Runkle case. In that case it is stated that "the President is pleased to remit all of the sentence, except so much thereof as directs cashiering, which will be duly executed."

It was insisted in the Runkle case that such an allegation in the findings of the court-martial was sufficient to justify the inference that the finding had been submitted to the President and approved by him, subject to the remission of all, except the cashiering. The Supreme Court said, in passing upon the legal effect of the record—

"But we are clearly of the opinion that it will not be sufficient unless it is authenticated in a way to show otherwise than argumentatively that it is the result of the judgment of the President himself, and that it is not a mere departmental order which might or might not have attracted his personal attention. The fact that the order was his own should not be left to inference only."

While in this case it does appear that the record was submitted to the President, following the rule of construction in the Runkle case it does not affirmatively appear that the President approved the sentence "to be dismissed the service of the United States."

We do not find a sufficient difference in substance between the record in this case and the record in the Runkle case to justify a different result from that case, and therefore render a judgment for the claimant in the sum of $11,572.75.

[NOTT, J., was absent from the city when the case was tried, and took no part in the decision.]

15 IX. *Final judgment.*

At a Court of Claims held in the City of Washington, D. C., on the 31st day of March, A. D. 1890, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the said Sally E. Page, executrix of Frank A. Page, do have and recover of and from the United States the sum of eleven thousand five hundred and seventy-two $\frac{75}{100}$ dollars ($11,572.75).

16 X. *Application of defendants for and allowance of appeal*

From the judgment rendered in the above-entitled cause on the 31st day of March, 1890, in favor of claimant, the defendants, by their Attorney-General, on the 15th day of May, 1890, make application for, and give notice of an appeal to the Supreme Court of the United States.

JOHN B. COTTON,
Assistant Attorney-General.

Filed May 15, 1890.

Allowed in open court June 9th, 1890.

WILLIAM A. RICHARDSON,
Chief Justice.

17 In the Court of Claims.

XI.

FRANK A. PAGE,
vs.
THE UNITED STATES. } No. 15745.

I, John Randolph, Assistant Clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court, of the judgment of the court, of the application of defendants for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 20th day of August, A. D. 1890.

[SEAL.] JOHN RANDOLPH,
Assistant Clerk Court of Claims.

(Indorsed on cover:) No. 1249. The United States, appellant, *vs.* Sally E. Page, executrix of Frank A. Page, deceased. Court of Claims. Filed August 27, 1890.

Office Supreme Court U. S.
FILED.
JAN 5 1891
JAMES H. McKENNEY

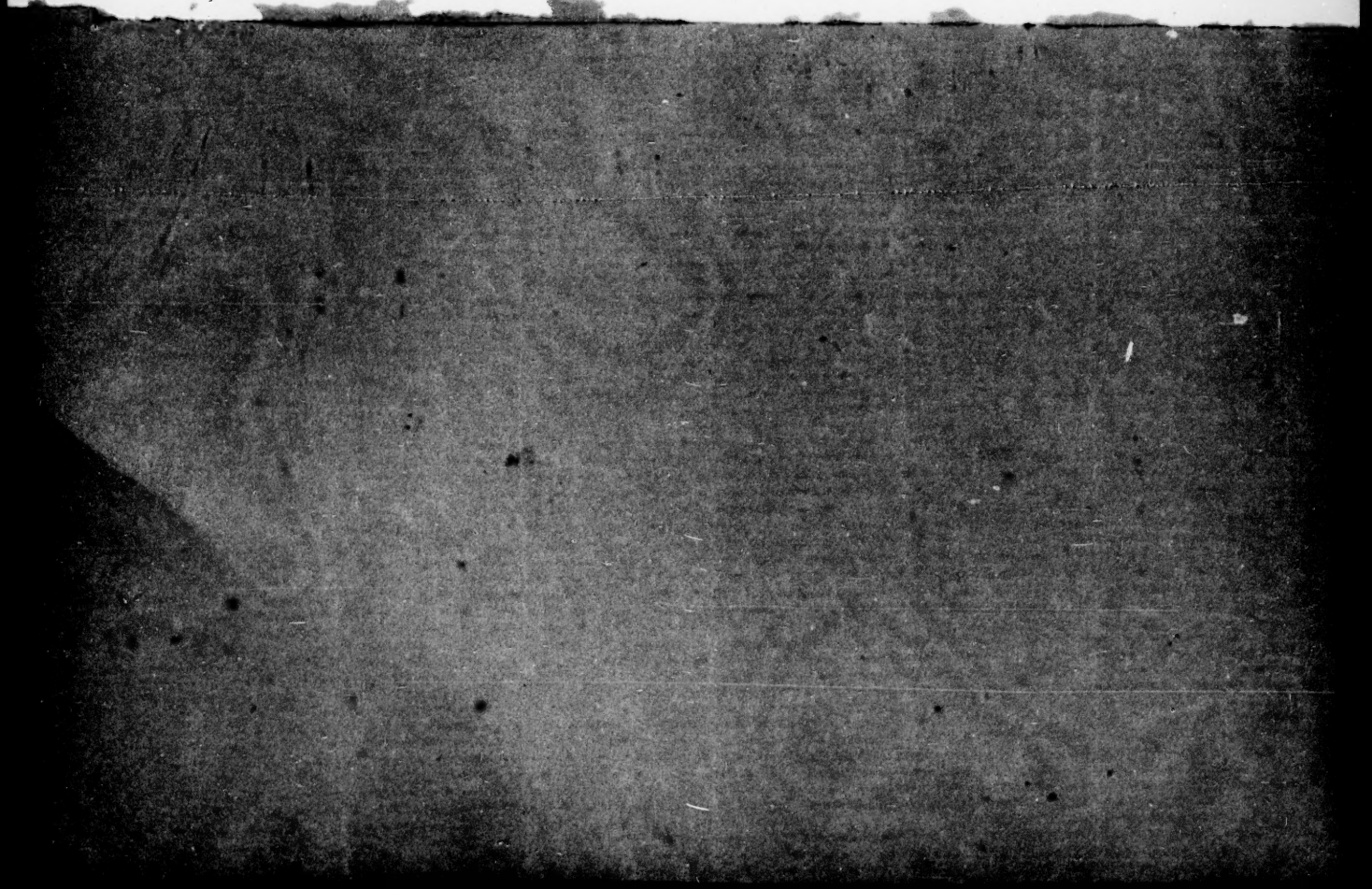
In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES, APPELLANT,
vs.
SALLY E. PAGE, EXECUTRIX OF Frank A. Page, deceased.
} No. 1249.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.



In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES, APPELLANT,
vs.
SALLY E. PAGE, EXECUTRIX OF Frank A. Page, deceased. } No. 1249.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

THE CASE.

This is an appeal from a judgment of the Court of Claims. The claimant sought to recover from the United States the pay of her testator as second lieutenant in the Army of the United States (retired), from May 27, 1874, amounting in all to $17,835.60. The court below dismissed so much of the claim as accrued more than six years before the filing of claimant's petition and gave judgment for the remainder; *i. e.*, $11,572.75.

STATEMENT OF FACTS.

Page, the claimant's testator, was a second lieutenant in the Tenth Regiment of Infantry, U. S. Army. On September 29, 1871, by order of the President, he was retired from active service, and placed on the retired list of the Army on account of wounds received in battle; *i. e.*, the loss of his right arm. On April 29, 1874, a court-martial was convened at New York City by virtue of Special Orders, No. 73, dated April 7, 1874, headquarters Military Division of the Atlantic, for Page's trial on three charges with various specifications. Of the first charge he was found not guilty. The second charge was that of "causing to be presented for payment a false and fraudulent claim against the United States, in violation of the act of March 2, 1863, chapter 67."

The specification under this charge was that Page had sold and transferred his pay account for the month of January, 1874, three times to different persons, and caused the same to be presented for payment through the third transferee to a paymaster of the United States, though he knew the claim thus presented was false and fraudulent. Of this charge and specification he was found guilty. The third charge was that of "conduct unbecoming an officer and a gentleman." The first specification was that Page transferred his pay account for November, 1873, to the Piedmont and Arlington Life Insurance Company, thereby enabling it to collect the money on the account from one United States Army paymaster, and after this transfer himself "fraudulently and dishonorably" collected pay for the same month from another paymaster of the United

States Army, "well knowing that he had no right or property in said claim or payment." The second and third specifications under this charge covered the transactions with respect to his pay account for the month of January, 1874, which were the subject of the specification under the second charge.

The finding of the court on the first specification under the third charge was guilty "except the words 'fraudulently and dishonorably' and the words 'he, the said Page well knowing that he had no right or property in said claim or payment.'"

On the second and third specifications and on the charge the finding was guilty.

The sentence was "to be dismissed the service of the United States."

The third finding of the Court of Claims (Record, page 7) is as follows:

> III. The proceedings, findings, and sentence were transmitted to the Secretary of War, who wrote upon the record the following order, viz:
>
> WAR DEPARTMENT,
> *Washington City, May* 27, 1874.
>
> In conformity with the sixty-fifth of the Rules and Articles of War, the proceedings of the general court-martial to the foregoing case have been forwarded to the Secretary of War and by him submitted to the President.
>
> The proceedings and findings upon the second charge and specification, and upon the third charge under its second and third specifications, are approved.
>
> With regard to the other findings, the remarks

noted by Major-General Hancock, who convened the court, are concurred in, as follows:

"The finding of the first specification is not approved. The sale of Lieutenant Page's pay accounts and right of pay to the Piedmont and Arlington Life Insurance Company is not sustained by the evidence. The transaction was unquestionably a pledge as collateral security; but the court having found that it was a sale, it is difficult to account for the rest of the finding to this specification, which describes the subsequent presentation of a claim against the United States for the same pay as false and fraudulent, although it acquits Lieutenant Page of knowing that it was such.

"In order to constitute fraud there must be a knowledge that the property belongs to another and a design to deprive him of it. So the word 'false,' used in this connection, implies an intent to cheat or defraud. Moreover, if the transaction with the Piedmont and Arlington Life Insurance Company was a sale, as the court found it to be, how could the accused, knowing that he had made such a sale, present a claim for the same pay without knowing that it was false and fraudulent? By its finding to the specification the court convicts the accused of presenting a claim against the United States for his pay, which was false and fraudulent, and yet acquits him of the charge of presenting for payment a false and fraudulent claim against the United States. The finding to the first charge is therefore likewise disapproved.

"Again, having by its finding to the specification of the first charge characterized the presenting of a claim for pay as false and fraudulent, the court, by its finding to the first specification of the third charge, say that he did not do it 'fraudulently and dishonorably' nor 'knowing that he had no right or prop-

perty in said claim or payment,' and this, notwithstanding that he is by the same finding found guilty of 'defrauding the United States.'

"The finding to this specification, however, convicts the accused of the facts upon which it is based.

"The sentence is approved.

"Second Lieut. Frank A. Page (retired) accordingly ceases to be an officer of the Army from the date of this order.

"WM. W. BELKNAP,
Secretary of War."

The said Secretary also issued May 27, 1874, general court-martial order No. 42, announcing the sentence of the court-martial, and that "Second Lieut. Frank A. Page (retired) ceases to be an officer of the Army from the date of this order." From the date of this order the claimant's name has not been borne on the Army Register, and he has received no pay as an officer of the Army since that time.

The seventh clause of the petition of the claimant is as follows:

VII. Your petitioner avers that the said order, so far as the same purports to dismiss him from the Army of the United States, or to deprive him of his said office, is null and void, and that he is entitled to receive his lawful pay, and to have and retain the said office, notwithstanding the said order; that the court-martial proceedings upon which the said order was predicated were never submitted to or approved by the President of the United States, and without such approval no power existed in the Adjutant-General or the Secretary of War to deprive him of his commission or his lawful pay as such second lieutenant.

This clause presents the only question in the case, *i. e.*, whether it sufficiently appears from the record of the court-martial proceedings and the indorsements thereon that they were submitted to the President, and that the findings and sentence were by him approved. If it does, then the sentence was valid; Page ceased to be a member of the Army; his executrix has no claim for pay for the period subsequent to the sentence, and the judgment below should be reversed. If approval by the President does not sufficiently appear, then the sentence of dismissal was a nullity and the judgment below must be affirmed.

ARGUMENT.

The order of May 27, 1874, indorsed upon the record, states that "in conformity with the sixty-fifth of the Rules and Articles of War, the proceedings of the general court-martial to the foregoing case have been forwarded to the Secretary of War, and by him submitted to the President."

The sixty-fifth Article of War (2 Stat., 367, c. 29), which was in force until the Revised Statutes took effect, June 22, 1874, and therefore applies to the case under discussion, was as follows:

> Any general officer commanding an army, or colonel commanding a separate department, may appoint general courts-martial whenever necessary. But no sentence of a court-martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same, or the officer commanding the troops for the time being; *neither shall any sentence of a general court-martial, in*

> *the time of peace, extending to the loss of life, or the dismission of a commissioned officer*, or which shall, either in time of peace or war, respect a general officer, *be carried into execution until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States, for his confirmation or disapproval, and orders in the case.* All other sentences may be confirmed by the officer ordering the court to assemble, or the commanding officer for the time being, as the case may be.

The submission to the President of the proceedings in this case, in conformity with the foregoing Article of War, was then a submission for his approval or disapproval. The statement which immediately follows the statement of the submission for approval to the President is—

> The proceedings and the findings upon the second charge and specifications, and upon the third charge, under its second and third charges, are approved.

Are approved by whom? Can there be any doubt? Does not that which goes before exclude the idea of approval by any one other than the person for whose approval or disapproval the proceedings are distinctly stated to have been submitted? The sequence of action in the sentences would not be plainer if they were united by "and." This would have been inserted, doubtless, but for the awkwardness of uniting in the same way the several long sentences of approval, concurrence, and disapproval which follow.

It is said that this result is reached by inference. In a certain sense it is so. But inference, speaking generally, is only sequence of ideas. Suppose the first and second

sentences of the order in this case were united by the words "by whom," no question could be made that "whom" referred to the President. That is also an inference, however, based on the proximity of the relative pronoun "whom" to the word "President" and the necessary sequence of ideas, that the approval announced as a fact should be the approval of the one to whom and for whose approval the proceedings were submitted.

The inference from the words as they stand that the approval is by the President is of the same kind. It is based both on the sequence of the sentences and of ideas, and is no less direct than that which connects the antecedent and the relative pronoun in the form of the sentences just supposed. If by inference is meant a course of reasoning leading to a conclusion from a balance of probabilities, then it is not true that the approval by the President is only a matter of inference in the order under discussion. The proximity of the sentences and the necessary connection between submission and an approval exclude entirely any other construction. There is no balance of probabilities. The fact of approval by the President stands out in the order and admits of no dispute. No other hypothesis can satisfy the words used.

The Secretary of War is the official mouthpiece of the President in such proceedings. The result is announced by him, but the approval is by the President. The tenses of the verbs are significant. The proceedings "*have been* * * * submitted to the President." "The proceedings and the findings * * * *are* approved." The same tenses would have been used had the sentences taken a

slightly different form without change of meaning: "The proceedings have been submitted to the President and he approves the same." The tenses show that the order is not a narrative of a past event, but that is the official expression of judicial action. As in the ordinary form of judgment, "The cause coming on to be heard and *having been submitted* to the court on the pleadings, evidence, and argument of counsel * * * *it is* considered and adjudged," etc.

What has been said as to the words "are approved" in the second sentence of the order has equal application to the words "are concurred in," in the third sentence, and to the words "the sentence is approved" near the end of the order.

The Court of Claims, in reaching its judgment in favor of the claimant, relied on the case of *Runkle* vs. *The United States* (122 U. S. R., 543). It is respectfully contended that the Runkle Case is plainly distinguishable from the case at bar. The order in the Runkle Case nowhere stated that the proceedings had been submitted to the President.

The comments upon and approval of the proceedings, in the order in that case, were all announced without any previous reference to the President at all. He was referred to only in the last clause of the order as being "pleased to remit all of the sentence, except so much thereof as directs cashiering which will be duly executed." The statement of the reasons upon which this remission was based referred to affidavits submitted subsequent to the sentence by the court-martial and did not refer to the evidence adduced in the proceedings, from all of which this

court held that the order might be properly divided in two parts, the first being a mere departmental order approving the sentence, which was not made by the President, and the second being the exercise of the pardoning power by the President, and therefore that the approval was a nullity.

The language of Chief Justice Waite upon this point in the Runkle Case was as follows (122 U. S. R., pp. 558, 559):

> Coming, then, to the order on which reliance is had to show the approval of President Grant, we find it capable of division into two separate parts, one relating to the approval of the proceedings and sentence, and the other to executive clemency which was invoked and exercised. It is signed by the Secretary of War alone, and the personal action of the President is nowhere mentioned except in a remission of a part of the sentence. There is nothing which can have the effect of an affirmative statement that the "whole proceedings" had been laid before him for action or that he personally approved the sentence.

Again the learned Chief Justice says (page 560):

> Then, again, at the end of the order are these words, "which (the sentence) will be duly executed." That which immediately preceded related to the remission of a part of the sentence, and the Secretary was careful to say that this was done by by the President in person. The omission of any such language, or implication even, in the words which were added, leaves the order open to the construction that the Secretary was acting all the time on the idea that the personal judgment of the President was required only in reference to that part of the

> proceeding which involved the exercise of the pardoning power, and that the rest belonged to the Department.

After stating the proceedings subsequent to the order, the Chief Justice continued:

> Under these circumstances, we can not say it positively and distinctly appears that the proceedings of the court-martial have ever in fact been approved or confirmed in whole or in part by the President of the United States, as the Articles of War required, before the sentence could be carried into execution.

Now, in the case at bar it is stated distinctly that the whole proceedings were laid before the President, and it does positively and distinctly appear from the ordinary meaning to be attached to words and their arrangement in sentences, and from the necessary sequence of ideas, that the approval given of the findings and sentence was that of the President and was not a mere departmental order of approval.

The difference between the order of approval here and that in the Runkle case is so marked that we doubt whether any reliance would be had on it as an authority at bar, were it not for the concluding clause of the opinion, which is as follows:

> Such being our view of the case it is unnecessary to consider any of the other questions which were referred to the Court of Claims. Neither do we decide what the precise form of an order of the President approving the proceedings and sentence of a court-martial should be, nor that his own signature must be affixed thereto.

> But we are clearly of opinion that it will not be sufficient unless it is authenticated in a way to show otherwise than argumentatively that it is the result of the judgment of the President himself, and that it is not a mere departmental order which might or might not have attracted his personal attention. The fact that the order was his own should not be left to inference only.

This language is to be taken in connection with the facts of the case which was being decided. There it was attempted to show by argument, based on presumptions and practice, that the order was the order of the President, while the arguments adduced by the court and quoted above led to a different conclusion. What the Chief Justice means here, it is respectfully submitted, is that when, from the language of the order, it becomes a matter of doubtful construction whether the President did in fact consider and approve the findings, the court will not weigh arguments *pro* and *con* and hold that the order was made by the President. In the case at bar, the fact that the President approved the findings appears by a process of reasoning, and in that sense, it is by inference.

But, as has been said above, the reasoning and inference is exactly like that which enables the reader to decide which noun is the proper antecedent for a pronoun. In each case the conclusion reached depends both on the order and proximity of the words, clauses, and sentences, and upon the sense, *i. e.*, upon the necessary sequence and connection of ideas. This is not reaching the conclusion "argumentatively" or "by inference only," as these terms are used by Chief Justice Waite in the foregoing opinion.

The process of reasoning or inference or argument to the conclusion here is so short and direct, and leads to a conclusion so free from doubt, as not to deserve the name of argument or inference as these terms are ordinarily used.

It is respectfully submitted that the court will not indulge the absurd hypothesis that after the Secretary had submitted the proceedings to the President for approval, he withdrew them without obtaining the action sought, and took the action himself and then made an order, the ordinary and reasonable and necessary construction of which is that the approval was by the President.

Some reliance is placed by counsel for the appellee upon paragraph 896 of the Regulations of the Army for 1863, which is:

> The Judge-Advocate shall transmit the proceedings without delay to the officer having authority to confirm the sentences, who shall state, at the end of the proceedings in each case, his decision and orders thereon.

That the officer herein referred to is not the President but a military officer conclusively appears from the paragraph immediately following, numbered 897, which is:

> The original proceedings of all general courts-martial, after the decision on them of the reviewing authority, and all proceedings that require the decision of the President under the 65th and 89th Articles of War, and copies of all orders confirming or disapproving or remitting the sentences of courts-martial, and all official communications for the Judge-Advocate of the Army, will be addressed to "The Adjutant-General of the Army, War Department," marked on the cover, "Judge-Advocate."

Paragraph 896, therefore, has no application whatever to the approval of court-martial proceedings by the President.

For the reasons given it is respectfully submitted that the judgment of the Court of Claims should be reversed.

WM. H. TAFT,
Solicitor-General.

Office Supreme Court U. S.
FILED.
JAN 5 1891
JAMES H. McKENNEY

IN THE

Supreme Court of the United States

No. 1249.

THE UNITED STATES, Appellant,

vs.

SALLIE E. PAGE, Executrix, Appellee.

BRIEF FOR THE APPELLEE.

JOS. E. McDONALD,
JOHN C. FAY,
Attorneys for Appellee.

IN THE

Supreme Court of the United States.

No. 1249.

THE UNITED STATES, APPELLANT,

vs.

SALLIE E. PAGE, EXECUTRIX, APPELLEE.

Brief for the Appellee.

This was a suit brought by Lieutenant Frank A. Page, a retired officer of the Army, to recover his pay as such officer; pending the suit he died and the suit being revived was prosecuted to final judgment in the Court of Claims by his widow and executrix.

The right to recover is based upon the illegality of certain court-martial proceedings which assumed to dismiss this officer from the army. The invalidity of the court-martial proceedings is the same in this case as it was in the case of Runkle *v.* The United States, 122 U. S., 543, to wit, the failure of the record to show the approval of the sentence by the President of the United States.

The law governing this subject is found in the then 65th Article of War (2 Stat. 367, c. 29), which, so far as it relates to the case at bar, is in the following language: * * * "Neither shall any sentence of a general court-martial, in time of peace, extending to the loss of life, or the dismission of a commissioned officer * * *

be carried into execution, until after the *whole* proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States for his confirmation or disapproval, and orders, in the case."

And in the following Army Regulation, which has the force of law, but which was not called to the attention of the Court in Runkle's case (*supra*):

"896. The Judge Advocate shall transmit the proceedings without delay to the officer having authority to confirm the sentence, *who shall state, at the end of the proceedings in each case*, HIS DECISION and *orders thereon*." (Rev. Army Reg. of 1863.)

The record in this case and in *Runkle's* case cannot be distinguished in principle; any difference in language is in favor of the present case. In *Runkle's* case it did appear that part of the sentence was remitted by the order of the President, but in the case at bar it is not even suggested that the sentence was confirmed by the President himself or even by his direction; the language is: "The sentence is approved." "Wm. W. Belknap, Secretary of War."

Says this Court in *Runkle's* case (p.):

"Thus it appears that the sentence of a general court-martial, in time of peace, to the effect that a commissioned officer be cashiered—dismissed from service—is inoperative until approved by the President. Before then it is interlocutory and inchoate only. (Mills *v.* Martin, 19 John., 7, 30; Simmons on Courts-martial, 6th ed., chap. XVII, p. 294.)

"A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished it is dissolved. 3 Greenl. Ev., § 470; Brooks *v.* Adams, 11 Pick., 442; Mills *v.* Martin, *supra*; Doolittle *v.* Smith, 3 S. & R., 590, 599. Such also is the effect of the decision of this court in Wise *v.* Withers, 3 Cranch, 331, which, according to the

interpretation given it by Chief Justice Marshall in *Ex parte* Watkins, 3 Pet., 193, 207, ranked as a court-martial as 'one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally.' To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law. Dynes *v.* Hoover, 20 How., 65, 80; Mills *v.* Martin, 19 John., 33. There are no presumptions in its favor so far as these matters are concerned. As to them, the rule announced by Chief Justice Marshall in Brown *v.* Keene, 8 Pet., 112, 115, in respect to averments of jurisdiction in the courts of the United States, applies. His language is: 'The decisions of this court require, that averment of jurisdiction shall be positive—that the declaration shall state expressly the facts on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred, argumentatively, from its averments.' All this is equally true of the proceedings of courts-martial. Their authority is statutory, and the statute under which they proceed must be followed throughout. *The facts necessary to show their jurisdiction and that their sentences were conformable to law must be stated positively; and it is not enough that they may be inferred argumentatively.*

"As the sentence now under consideration involved the dismissal of Runkle from the army, it could not become operative until approved by the President, after the whole proceedings of the court-martial had been laid before him. The important question is, therefore, whether that approval has been positively shown. * * *

"The action required of the President is judicial in its character, not administrative. As commander-in-chief of the army he has been made by law the person whose duty it is to review the proceedings of courts-martial in cases of this kind. This implies that he is himself to consider the proceedings laid before him and decide personally whether they ought to be carried into effect. Such a power he cannot delegate. His personal judgment is required, as much so as it would have been in passing on the case, if he had been one of the members of the court-martial itself. He may call others to

his assistance in making his examinations and in informing himself as to what ought to be done, but his judgment, when pronounced, must be his own judgment and not that of another. And this because he is the person, and the only person, to whom has been committed the important judicial power of finally determining upon an examination of the whole proceedings of a court-martial, whether an officer holding a commission in the army of the United States shall be dismissed from service as a punishment for an offense with which he has been charged, and for which he has been tried. In this connection the following remarks of Attorney-General Bates, in an opinion furnished President Lincoln, under date of March 12, 1864 (11 Opinions Attorney-General, 21), are appropriate:

"'Undoubtedly the President, in passing upon the sentence of a court-martial, and giving to it the approval without which it cannot be executed, acts judicially. The whole proceeding from its inception is judicial. The trial, finding, and sentence are the solemn acts of a court organized and conducted under the authority of and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice; rights which, in the very nature of things, can neither be exposed to danger nor subjected to the uncontrolled will of any man, but which must be adjudged *according to law*. And the act of the officer who reviews the proceedings of the court, whether he be the commander of the fleet or the President, and without whose approval the sentence cannot be executed, is as much a part of this judgment, according to law, as is the trial or the sentence. When the President, then, performs this duty of approving the sentence of a court-martial dismissing an officer, his act has all the solemnity and significance of the judgment of a court of law.'

"We go, then, to the record to see whether it shows positively and distinctly that the sentence dismissing Runkle from the service was approved by President Grant."

Turning now to the record of the case at bar, does it show positively and distinctly that Page's sentence was

approved by President Grant? Is it "authenticated in a way to show otherwise than argumentatively that it is the result of the judgment (the judicial judgment) of the President himself"? Is not the fact whether the order was or was not his own "left to inference only"?

The finding of the Court of Claims on this subject is as follows (Record, p. 7):

III.

"The proceedings, findings, and sentence were transmitted to the Secretary of War, who wrote upon the record the following order, viz.:

WAR DEPARTMENT,
WASHINGTON City, *May* 27, 1874.

In conformity with the 65th of the Rules and Articles of War, the proceedings of the general court-martial to the foregoing case, have been forwarded to the Secretary of War, and by him submitted to the President.

The proceedings and the findings upon the second charge and specification, and upon the third charge under its second and third specifications, are approved.

With regard to the other findings, the remarks noted by Major-General Hancock, who convened the court, are concurred in as follows:

"The finding to the first specification is not approved. The sale of Lieutenant Page's pay accounts and right of pay to the Piedmont and Arlington Life Insurance Company is not sustained by the evidence. The transaction was unquestionably a pledge as collateral security. But the court having found that it was a sale, it is difficult to account for the rest of the finding to this specification, which describes the subsequent presentation of a claim against the United States for the same pay as false and fraudulent, although it acquits Lieutenant Page of knowing that it was such.

"In order to constitute fraud there must be a knowledge that the property belongs to another and a design to deprive him of it. If these are wanting it is not fraud. So the word 'false' used in this connection implies an intent to cheat or defraud. Moreover, if the transaction with the Piedmont and Arlington Life Insurance Com-

pany was a sale, as the court found it to be, how could the accused, knowing that he had made such a sale, present a claim for the same pay without knowing that it was false and fraudulent? By its finding to the specification the court convicts the accused of presenting a claim against the United States for his pay which was false and fraudulent, and yet acquits him of the charge of 'presenting for payment a false and fraudulent claim against the United States.' The finding to the first charge is therefore likewise disapproved.

"Again, having by its finding to the specification of the 1st charge characterized the presenting of a claim for pay as false and fraudulent, the court, by its finding to the 1st specification of the 3d charge, say that he did not do it 'fraudulently and dishonorably,' nor 'knowing that he had no right or property in said claim or payment,' and this, notwithstanding that he is by the same finding found guilty of 'defrauding the United States.'

"The finding to this specification, however, convicts the accused of the facts upon which it is based."

The sentence is approved.

Second Lieut. Frank A. Page (retired) accordingly ceases to be an officer of the Army from the date of this order.

WM. W. BELKNAP,
Secretary of War.

The said Secretary also issued May 27, 1874, General Court-Martial Order No. 42, announcing the sentence of the court-martial, and that "Second Lieut. Frank A. Page (retired) ceases to be an officer of the Army from the date of this order." From the date of this order the claimant's name has not been borne on the Army Register, and he has received no pay as an officer of the Army since that time."

The whole order is *departmental*. It is headed "War Department, Washington City, May 27, 1874," and is signed "Wm. W. Belknap, Secretary of War"; it does not purport to be an executive order; it does not claim to be issued by the authority, direction or with the assent of the President; it is pure and simple a War De-

partment order; it nowhere says that the President approves the sentence, or that he orders its approval. Whatever of inference could be drawn from its form and language would be the inference that the Secretary of War was acting for himself, as the order itself imports. It was argued in the Court of Claims that an inference or implication of Presidential approval might be found in the first sentence of the order. Waiving for the present the invalidity of such inference even if true, can it be inferred or implied from the statement that the proceedings had been submitted to the President; that he acted upon them and confirmed the sentence? If the President approved or ordered the approval of the sentence it was easy to say so. It is not the submission of the case to the President that gives vitality to the proceedings, but it is his *act* in confirming the sentence that gives it force.

The learned Solicitor-General, in a labored effort, undertakes to distinguish this case from *Runkle's* case and seeks to show that a "grammatical inference" only must be indulged in to eke out the necessary Presidential approval. The language of this Court in that case is too unmistakably plain to be overcome by the ingenious argument of the learned gentleman; to be compelled to resort to the subtlety of his argument to establish the meaning of the judicial record of a criminal proceeding, only emphasizes the logic and reasoning of this Court in Runkle's case.

But we are not left entirely to argument as to how the confirmation of a sentence of a court-martial shall be confirmed; we have positive law in Revised Army Regulation, No. 896, on the subject. The reviewing officer (in this case the President) shall state at the end of the proceedings his decision. This judicial duty cannot be delegated, and in the case at bar, the court-martial record does not disclose its performance, no inference or impli-

cation can eke out the fatal omission, nor in the present case would it have been an immaterial omission. The absurd conclusions of the court-martial as pointed out in General Hancock's criticism on page 7 of the Record would undoubtedly have attracted attention had a judicial review of the proceedings been made by the President, and would probably have saved the disabled veteran the disgrace of a dismissal from the army.

The learned Court of Claims (Record, p. 9) could discover no distinction in the case at bar, from the principles laid down by this Court in the careful and elaborate opinion in *Runkle's* case.

The judgment of the Court of Claims should be affirmed.

JOS. E. MCDONALD,
JOHN C. FAY,
Attorneys for Appellee.